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No. 99-784

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

AMERICAN HOME PRODUCTS CORPORATION,
Petitioner,

v.

STATE OF OREGON and DOUGLAS J. AXEN,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Oregon

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. THIS CASE SQUARELY PRESENTS THE EIGHTH AMENDMENT ISSUE.

Whether the Eighth Amendment limits punitive-damage awards in which a State shares is an unsettled issue this Court itself pointed out more than ten years ago. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 272, 275 n.21 (1989); see also *id.* at 298-99 (opinion of O'Connor, J., joined by Stevens, J.); see Pet. Cert. 10-12. The appropriateness and need for this Court to decide it has been noted many times by commentators. See Pet. Cert. 23-24.

The Brief in Opposition argues that the Eighth Amendment should not apply when a State did not initiate the proceeding that produced the punitive award. Br. Opp. 17-22. That was indeed what the court below, following

Oregon precedent, held. Pet. Cert. App. 46a-47a. And that is exactly the undecided question the petition presents. Respondent's arguments for distinguishing the reasoning of cases like *Browning-Ferris, Alexander* v. *United States*, 509 U.S. 544, 558 (1993), *Hudson* v. *United States*, 522 U.S. 93, 103 (1997), and *United States* v. *Bajakajian*, 524 U.S. 321, 327 (1998), go to the merits. They do not affect the need for this Court's review, at which time respondent's proposed distinctions can be considered.

The Oregon court's conflict with those decisions of this Court is reason enough to grant certiorari. In addition, there is broad disagreement in reasoning and results in the lower courts. The Brief in Opposition is unable to do more than quarrel with the reasoning of the Georgia Supreme Court's holding that the Eighth Amendment indeed applies when a State shares in a punitive-damage award. See, *e.g.*, Br. Opp. 22 (dismissing *Mack Trucks, Inc.* v. *Conkle*, 263 Ga. 539, 545, 436 S.E.2d 635, 640 (1993), on ground that "the court simply assumed that it did"). Other state and federal courts have recognized a "real and substantial" constitutional question. *Rodriguez* v. *Suzuki Motor Corp.*, 996 S.W.2d 47, 52-53 (Mo. 1999); see cases cited at Pet. Cert. 13-14. *Spaur* v. *Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (Iowa 1994), on which respondent seeks to rely, Br. Opp. 23, assumed that the Eighth Amendment would apply but for the allocation of the State's share to an independent trust fund.

II. THE CONFLICT WITH RESPECT TO TRIAL-COURT REVIEW IS CLEAR.

Respondent Axen acknowledges that the Oregon Court of Appeals affirmed the trial court's entry of the punitive award "without explanation." Br. Opp. 26. Respondent even concedes "the significance of having a statement of reasons on the record." *Id.*

Faced with the conflict with *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), and *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), respondent argues that the requirement of articulated reasons was rejected in a plurality opinion in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 464-65 (1993) (opinion of Stevens, J.). Br. Opp. 27. That reading of that opinion is incorrect. See Pet. Cert. 21. And respondent has no answer for this Court's subsequent decision in *Honda*, which he concedes reiterated *Haslip*'s requirement of "meaningful" and "adequate" trial-court review. *Haslip*, 499 U.S. at 20; *Honda*, 512 U.S. at 420; see Br. Opp. 27-28.

Respondent also argues that, in addition to specifically requesting the trial court to provide the due process protections required by *Haslip*, petitioner was further required, separately and redundantly, to ask the trial court to explain its ruling, lest petitioner "forfeit[] whatever right it had to an explanation." Br. Opp. 26. The Court of Appeals certainly did not adopt such reasoning. If that were the law, it no doubt would come as a surprise to the many courts that have held without any such added formalism that due process requires trial courts to state their analysis in reviewing punitive-damage awards under *Haslip*. Petitioner specifically invoked *Haslip*; it was not required to move for reconsideration to preserve its right to due process, and the Oregon court did not hold that it was.

The Court of Appeals here plainly ruled instead that although "AHP argues that due process requires a trial court to make findings of fact and state its conclusions of law on the record," nevertheless "We disagree." Pet. Cert. App. 34a. The court was following Oregon precedent. See *Oberg* v. *Honda Motor Co.*, 322 Or. 544, 552 & n.9, 888 P.2d 8, 12 & n.9 (1995) (holding on remand from this Court that "[w]e are in as good a position as would be the trial court to apply a legal standard to the evidence in the record," "even though the trial court has

not done so"), *cert. denied*, 517 U.S. 1219 (1996). But "meaningful" review by the trial court is an essential component of the due process guarantee. It is clear that with respect to the due process requirements of trial-court review of punitive damages, Oregon is marching to its own drummer.[1]

III. RESPONDENT AXEN'S PROCEDURAL ARGUMENTS ARE INSUBSTANTIAL.

A. The Excessive Fines Clause Issue Was Raised in and Decided by the Oregon Courts.

There is no basis whatsoever for respondent Axen's representation to this Court that "none of them [issues of Eighth Amendment applicability and scope] was briefed, argued or decided in the lower courts." Br. Opp. 16. First, there can be no doubt that the Oregon Court of Appeals specifically considered and rejected petitioner's claim that it was entitled to the protection of the Eighth Amendment's Excessive Fines Clause, made applicable to the states by the Fourteenth Amendment. Pet. Cert. App. 42a n.28, 46a-47a. That issue is squarely and properly before this Court.

Moreover, petitioner's Eighth Amendment argument was raised in every one of the three Oregon courts: in post-trial motions in the trial court; in its opening brief in the Court of Appeals; in its reply brief in the Court of Appeals; at oral argument in the Court of Appeals; in its petition for reconsideration in the Court of Appeals; and in its petition for review to the Supreme Court of Oregon.[2] Indeed, respondent overlooks that he himself ar-

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[1] The issue of the scope and nature of appellate review of punitive-damage awards is also presented in *Orthofix S.R.L.* v. *EBI Medical Systems, Inc.*, No. 99-687, currently pending on petition for certiorari.

[2] See Defendant's Memorandum in Support of Alternative Motions for Judgment Notwithstanding the Verdict and New Trial, Circuit Court for Multnomah County, March 21, 1997, at 16-17; Appellant's Brief, Oregon Court of Appeals, Feb. 2, 1998, at 46-48;

gued in response in the Oregon Court of Appeals not only that Eighth Amendment protections should not apply, but also that "the excessive fines clause does not apply to the states through the due process clause." Respondents' Brief, Oregon Court of Appeals, May 27, 1998, at 49.

B. The Petition Is Timely.

Respondent Axen makes the curious argument that although final judgment for $20,000,000 punitive damages has been entered against petitioner, and petitioner has exhausted all review available in the Oregon court system, nevertheless somehow the petition is "not timely," Br. Op. 15, "not ripe," *id.*, indeed, "hopelessly premature," *id.* at 14. He argues that "[i]f the State of Oregon acquires a share of the punitive damages awarded to respondent, petitioner may then assert any Eighth Amendment argument it has directly against the State." Br. Opp. 15.

That assertion overlooks several realities: (1) There is no "if." The State already has been awarded a share of the punitive judgment, and that final judgment has been affirmed on appeal. See Pet. Cert. App. 53a, 42a, 47a, 1a. (2) Petitioner's Eighth Amendment right to the protection of the Excessive Fines Clause in any proceeding in which the State shares in the punishment applies to the review and validity of the punitive judgment as a whole, and not just to a portion. (3) If respondent really means to suggest, *cf.* Br. Opp. 16 and 17 n.6, that certiorari should not lie until the judgment has been collected, that is answered by the familiar provisions of 28 U.S.C. § 1257 and 2101(c) and Rule 13.3, by which this

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Appellant's Reply Brief, Oregon Court of Appeals, July 28, 1998, at 14; Transcript of Oral Argument, Oregon Court of Appeals, Oct. 22, 1998, at 21-22; Petition for Reconsideration, Oregon Court of Appeals, Feb. 23, 1999, at 12; Petition for Review, Supreme Court of Oregon, May 25, 1999, at 45-46.

Court reviews final "judgments." See, *e.g.*, *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945); *Market St. Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 552 (1945) ("When the case is decided, the time to seek our review begins to run").[3]

C. Whether the State Participates as a Party Is Immaterial.

Respondent Axen's suggestion, Br. Opp. 15-16, that somehow it matters whether the State participates as a party in this Court is a complete red herring. The questions presented in the petition for certiorari are not affected by whether the State is labeled a party, or whether the State chooses to participate. Petitioner is not challenging the constitutionality of Or. Rev. Stat. § 18.540. Petitioner's Eighth Amendment claim, based on *Browning-Ferris*, is that if as here a State enacts a structure allocating punitive awards to itself, all punitive damages awarded are subject to the Excessive Fines Clause. The Oregon Court of Appeals held to the contrary, Pet. Cert. App. 46a-47a, and that is the issue presented in the petition. And of course the petition's second question, as to

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[3] Respondent Axen's suggestion that someday he may bring a separate civil action against the State to challenge Or. Rev. Stat. § 18.540 as an unconstitutional taking from him, Br. Opp. 17 n.6, is irrelevant to petitioner's Eighth Amendment claims, as well as speculative. The record shows that so far respondent has voluntarily dismissed such a challenge in this case, instead entering a stipulation with the State (which petitioner did not join, see p. 7a, *infra*) reciting that jurisdiction of his own cross-appeal against the State was lacking. See Pet. Cert. App. 3a n.1. The Oregon court adopted the State and Axen's request for dismissal because "the State of Oregon, in its capacity as a party with an interest in punitive damages collected by plaintiff" had not been a party at the time the trial court's judgment was entered. P. 8a, *infra*. Petitioner is unaware of what if any understandings may exist between the State and respondent; clearly they both seek in coordinated filings to have this petition for certiorari denied.

the due process requirement of trial-court review, does not depend on whether a State is involved in the litigation at all.[4]

The Solicitor General of Oregon wrote to the Clerk of this Court on December 23, 1999, that the State now considers itself "a non-party judgment creditor" but "not a party in this matter." See pp. 4a, 5a, *infra*.[5] That is contrary to the State's previously stated position.[6] There is of course no requirement that the State file a brief in opposition, Supreme Court Rule 15.1, and presumably any party may waive whatever rights it has. Notably the State has not, however, filed any waiver of the judgment awarded to it. Indeed, the State's most recent letter concludes by saying that "it does have an interest in the issues presented" and "urges this Court to deny the petition." Pp. 5a, 6a, *infra*.[7] By its own acknowledgment and

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[4] If, as respondent asserts, the petition somehow were "not timely until the State of Oregon is a party," Br. Opp. 15-16, then in any case in which punitive damages were awarded to a State, the judgment could escape Eighth Amendment review by the device of the State's declaring itself not a party.

[5] The characterization "non-party judgment creditor," which respondent Axen echoes, Br. Opp. 4, 21, borders on an oxymoron.

[6] After the trial court entered its judgment, and in response to the notice of appeal, the Assistant Attorney General of Oregon wrote to petitioner's counsel:

> "I represent the Oregon Department of Justice Criminal Injuries Compensation Account, a judgment creditor as to the punitive damages portion of the award in the above matter. . . .
>
> "*The Department of Justice is now an interested party in this proceeding.* I have received a copy of the Notice of Appeal. Please send all future pleadings, notices, briefs and similar documents to my attention at the address given above."

Letter of Assistant Attorney General Kristin N. Preston, May 7, 1997 (emphasis supplied), pp. 1a-2a, *infra*. Petitioner complied.

[7] Respondent Axen nevertheless appears to criticize petitioner for having listed the State as a respondent. See Br. Opp. 4, 16. Under

by the judgment, the State is at the very least a real party in interest.

D. An Unreviewed Oregon Trial-Court Ruling in Another Case Does Not Affect Certiorari.

Respondent Axen argues that because a trial judge in a different case held the Oregon statute unconstitutional as a taking from private plaintiffs, in an unreviewed decision just beginning Oregon's lengthy appellate process, petitioner should be denied review by this Court of the issues squarely raised in this petition. Such a ruling does not affect this Court's review.

—Respondent does not even attempt to claim that an unpublished and unreviewed ruling by a single judge in a trial court has any binding effect in other cases. This Court has several times recognized the non-precedential effect of state trial-court rulings. *Cf., e.g., Commissioner* v. *Estate of Bosch*, 388 U.S. 456, 465 (1967); *King* v. *Order of United Commercial Travelers*, 333 U.S. 153, 160-61 (1948).

—Or. Rev. Stat. § 18.540 has been applied and approved by the Supreme Court and Court of Appeals of Oregon in many cases, and there is no reason to expect a

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the Rules of this Court, petitioner was required to do so. Rule 12.6 provides that "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties . . . unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition." Petitioner could scarcely have represented under Rule 12.6 that the State has no interest; judgment was entered in this case in favor of both the State and respondent Axen, Pet. Cert. App. 53a; the state was listed as a party in the Court of Appeals, Pet. Cert. App. 2a; the State had emphatically informed petitioner that by the entry of judgment it had become a party, see n. 6, *supra*; and if certiorari is granted and the judgment, which petitioner challenges as constitutionally excessive, ultimately is reversed, the State will not receive several million dollars.

trial judge's novel ruling to be adopted by them. *Cf. Delashmutt* v. *Myers*, 329 Or. 516, —— P.2d —— (1999) ("On several occasions . . . this court has approved, against a variety of constitutional challenges, legislative choices to limit damages in some kinds of civil actions"). See generally *Tenold* v. *Weyerhaeuser Co.*, 127 Or. App. 511, 873 P.2d 413 (1994), *review dismissed*, 321 Or. 561, 901 P.2d 859 (1995) (cited with approval in the decision below, see Pet. Cert. App. 46a-47a); *Honeywell* v. *Sterling Furniture Co.*, 310 Or. 206, 210-11, 797 P.2d 1019, 1021 (1990); *Butler* v. *State of Oregon Dep't of Corrections*, 138 Or. App. 190, 194, 909 P.2d 163, 166 (1995); see also *In re Stein*, 236 B.R. 34, 37 (D. Or. Bky. 1999).

—The State of Oregon is defending the constitutionality of Or. Rev. Stat. § 18.540 in the very case respondent cites. The State has not acquiesced in that trial judge's ruling, and continues to apply Or. Rev. Stat. § 18.540 to obtain its share of punitive-damage awards.

—Respondent seeks to invoke several layers of speculation about the distant future. Even if someday Oregon's highest court were to reject Or. Rev. Stat. § 18.540, or if someday the Oregon legislature were to repeal it, that would not alter the need for review. Respondent does not challenge the fact that similar provisions exist in a number of States, and cannot deny that several courts and many commentators have noted, as did this Court in *Browning-Ferris*, that for a State to be allocated a portion of punitive damages raises a serious issue of compliance with the Excessive Fines Clause.[8]

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[8] The first thirteen pages of the Brief in Opposition are devoted to a review of the trial evidence, closely resembling respondent's closing argument to the jury. Because the two issues raised in the petition concern only the requirements of review under the Eighth and Fourteenth Amendments, petitioner will not burden the Court

CONCLUSION

For the reasons stated herein and in the petition, certiorari should be granted.

Respectfully submitted,

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in this reply by listing the serious errors and omissions in respondent's account. See generally Pet. Cert. 2-4, 17-18.